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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 617

JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From United States District Court for the Northern District of Alabama—Southern Division

JURISDICTIONAL STATEMENT

JAMES W. WRAPE
JAMES N. CLAY, III
2111 Sterick Building
Memphis 3, Tennessee
Counsel for Appellants

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N.W.
Washington 5, D. C.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Alabama is reported at 205 F. Supp. 640. This memorandum opinion and decree was issued on June 8, 1962. By order of July 31, 1962 a final order amending the memorandum opinion and decree of June 8, 1962 was issued. Said final order is not reported. Because these opinions, decrees, and

orders are set forth verbatim as Appendices C, D, and E, in the Jurisdictional Statement in cause No. 425—October Term, 1962 in the Supreme Court of the United States in an action entitled *Birmingham Ice and Cold Storage Company and Shaw Warehouse Company, Appellants* v. *Southern Railway Company, et al., Appellees,* which cause is directly related, and the appellants herein are appealing from the identical opinions, decrees and orders as the appellants in cause No. 425—October Term, 1962, it is respectfully requested that the said Appendices C, D, and E be incorporated by reference in this Jurisdictional Statement as if reproduced herein. The report of the Interstate Commerce Commission is printed at 308 I.C.C. 609 which ultimately became effective September 1, 1960. It is reproduced as Appendix A to this Statement. The validity of the decision of the Interstate Commerce Commission was upheld by a statutory Three-Judge District Court in *Southern Railway Company* v. *United States,* 186 F. Supp. 29 (N.D. Ala. 1960), and was adverted to in *Shaw Warehouse Company* v. *Southern Railway Company,* 288 F. 2d 759 (C.A. 5, 1961), *rehearing denied,* 294 F. 2d 850 (C.A. 5, 1961). The latter two decisions are not reproduced herein as they are not deemed essential to the ultimate determination by the Court herein, except to the extent that the aforementioned decision, of the Interstate Commerce Commission was held to be valid and enforceable.

JURISDICTION

The proceeding below was instituted by the United States of America at the request of the Interstate Commerce Commission under Sections 1, 2, and 3 of the Elkins Act, as amended [49 U.S.C., §§ 41, 42, and 43] and Sections 2, 3, 6 (7) and 20 (9) of the Interstate

Commerce Act, as amended [49 U.S.C., §§ 2, 3, 6 (7) and 20 (9)]. See Appendix F to Jurisdictional Statement in No. 425—October Term, 1962 which is incorporated herein by reference for full reproduction. The complaint sought an injunction against the sale of any of the premises at the Birmingham Food Terminal owned by Southern Railway Company at less than full cost, or fair market value, and the renting of such premises at rentals less than the fair market rental, or rentals computed upon the full cost of such premises as prescribed by the Interstate Commerce Commission.

The judgment of the District Court, incorporated by reference, was initially entered on June 8, 1962. Subsequent to motions of Jefferson Warehouse and Cold Storage Company, W. C. Hudlow, Jr., Southern Railway Company and Georgia Industrial Realty Company to alter and amend such opinion and decree and after argument thereon, final judgment was rendered on July 31, 1962. Notice of Appeal was filed on behalf of Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr. in the District Court on September 27, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 45 of the Elkins Act, 49 U.S.C. 45, and Sections 2101 (b) and 2323 of the Judicial Code, 28 U.S.C. 2101 (b) and 2323. The following decisions sustained the jurisdiction of this Court to review the judgment on direct appeal in this case: *Union Pacific R. Co.* v. *U. S.*, 313 U.S. 450, 61 S. Ct. 1064, 85 L. Ed. 1453, *rehearing denied*, 314 U.S. 707, 62 S. Ct. 51, 86 L. Ed. 565; *U. S.* v. *New York, N.H. & H.R. Company*, 276 F. 2d 525, *cert. denied*, 362 U.S. 961, 964, 80 S. Ct. 877, 4 L. Ed. 2d 876, 878.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Elkins Act are set forth in Appendix F to the Jurisdictional Statement in Cause No. 425—October Term, 1962, which are incorporated herein by reference as if reproduced verbatim.

QUESTIONS PRESENTED

1. Did the District Court err in overruling the motion of Jefferson Warehouse and Cold Storage Company (hereafter sometimes referred to as Jefferson) and W. C. Hudlow, Jr. (hereafter sometimes referred to as Hudlow) to amend the memorandum opinion and decree of the Court entered on June 8, 1962?

2. Did the District Court err and abuse its discretion by discriminating against Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., in requiring the payment of rentals by them for periods, and, upon bases, in excess of the requirements imposed upon other tenants of the Birmingham Food Terminals facility, all named as defendants in the cause, and against all of whom similar relief was prayed, and in failing to find that Jefferson Warehouse and Cold Storage Company was the only tenant which had attempted to comply with the order of the Interstate Commerce Commission from September 1, 1960, and which had, in fact, paid full rental thereunder for all premises occupied by it from, and after, such date?

3. Did the District Court err in receiving in evidence and considering depositions taken in other cases and proceedings to which neither Jefferson Warehouse and Cold Storage Company nor W. C. Hudlow, Jr., was a party, without any predicate having been laid therefor?

4. Did the District Court err in not excluding from the base upon which rental was ordered to be paid early completion costs, costs incurred to correct defectively installed refrigeration equipment and costs of unused engineering plans, all incurred by previous occupants of buildings numbers 2 and 8, and from which Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., received no benefit?

5. Did the District Court err in finding that Jefferson Warehouse and Cold Storage Company was created as a part of a concession device, in failing to recognize that such company was a separate corporate entity, created for a lawful and legitimate purpose, and in finding that W. C. Hudlow, Jr., was personally responsible for the indebtedness of Jefferson Warehouse and Cold Storage Company found to be due by the Court.

6. Did the District Court err in failing to find that in the warehousing industry payment of rental upon the basis of space occupied is a recognized and established custom and practice, and finding that Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., should be charged with rentals for entire buildings, irrespective of rental agreements between the parties and occupancy of such buildings?

7. Did the Court err in finding that there was assurance to W. C. Hudlow, Jr., of Southern's cooperation in preserving the continuity of operations and in protecting the good will of Nelson Company and Birmingham Terminal Cold Storage Company; that there was unjust discrimination, favoritism, and invidious rebates in the transactions between Southern and Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr.; and in not finding that Jefferson Ware-

house and Cold Storage Company was organized as a legitimate business enterprise and, as such, rendered a distinct service to Southern and the shipping public by protecting them from the losses and damages with which they were confronted by virtue of the inability of two bankrupt corporations to care for, and deliver, goods then in storage?

8. Did the District Court err in attaching undue significance to the fact that Jefferson Warehouse and Cold Storage Company was organized with $1,000.00 capital, and in attaching no significance to the operating capital required and made available to it by loans, upon the personal endorsement of W. C. Hudlow, Jr., and without utilization of the credit of Southern?

9. Did the District Court err in not finding that the proceeds of all assets of the bankrupt corporations, Nelson Company and Birmingham Cold Storage Company were duly accounted for and distributed to creditors of such companies, and that Jefferson Warehouse and Cold Storage Company made payment in full for all equipment of such bankrupts used or acquired by Jefferson Warehouse and Cold Storage Company?

10. Did the District Court err in finding that W. C. Hudlow, Jr., agreed to repay the principal of an outstanding bank loan of Birmingham Terminal Cold Storage Company out of the profits of the cold storage warehouse business then being operated in building number 8, and in not finding that such payment was to be made from the profit of the business to be operated by Jefferson Warehouse and Cold Storage Company in such building?

11. Did the District Court err in not finding that Jefferson Warehouse and Cold Storage Company, as

a new tenant of facilities at the Birmingham Food Terminal, was not a party to any construction agreement, or proceeding before the Interstate Commerce Commission, or litigation in any court, but could lawfully pay rental for such facilities upon a negotiated base which took into consideration and was predicated upon current factors, including efficiency, obsolescence, and depreciation of such facility, irrespective of costs found by the Interstate Commerce Commission to be initially includable in the rental base?.

12. Did the District Court err in failing to find that W. C. Hudlow, Jr., as an individual was neither a shipper nor receiver of freight in interstate commerce?

STATEMENT OF THE CASE

In 1955 a contract was entered into between an Alabama corporation known as Birmingham Food Terminal, and Georgia Industrial Realty Company, a wholly owned subsidiary of Southern Railway Company, as a result of which a food terminal and warehousing facility was to be constructed in Birmingham, to be known as Birmingham Food Terminal. Stockholders in Birmingham Food Terminal were to be tenants of the proposed facility.

Upon the filing of a complaint with the Interstate Commerce Commission by Shaw Warehouse Company and others in the cause styled *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609, the proposed financing for the Birmingham Food Terminal was withdrawn, and a so-called "Round Robin Agreement" was entered into between Georgia Industrial Realty Company and prospective tenants of Birmingham Food Terminal. This agreement provided for the purchase of facilities occupied by the prospec-

tive tenants, and the payment of interim rentals therefor. Two of the signatories thereto were Birmingham Terminal Cold Storage Company and Thomas N. Nelson Company. These two companies occupied buildings designated as buildings numbers 2 and 8. The court below found:

> "As of July 1, 1958, Nelson Company owed back rents, later found inadequate by the Commission, in the amount of $176,410.04, and Terminal Cold Storage owed $61,239.88. Neither was able to pay its arrearage and neither was able to continue its operation".

The practical aspects of the situation were, therefore, that in two large warehouses the Nelson Company and Birmingham Terminal Cold Storage Company had millions of pounds of merchandise in cold storage, against which warehouse receipts had been issued, and, as stated by the court below, "neither was able to continue its operation." Southern Railway Company was perforce confronted with the necessity of going into the warehousing business or working out some arrangement with an experienced warehouseman to take over the operation of buildings Nos. 2 and 8 in the Birmingham Food Terminal.

Southern Railway Company had had satisfactory experience with Mr. W. C. Hudlow, Jr., in the operation of Chattanooga Warehouse and Cold Storage Company in Chattanooga, Tennessee.

As a result of Southern's solicitation in July, 1958, W. C. Hudlow, Jr., agreed to conduct warehousing operations at buildings Nos. 2 and 8 through a corporation to be formed, and which was formed, known as Jefferson Warehouse and Cold Storage Company.

The assets of Birmingham Ice and Cold Storage Company and of Thomas N. Nelson Company were liquidated by Southern Railway Company, and every single penny received from the liquidation thereof was paid to the creditors of such companies. Some of the experienced personnel of Chattanooga Warehouse and Cold Storage Company devoted some time to converting the operations at buildings Nos. 2 and 8 at the Birmingham Food Terminal facility to an efficient operation, and they were paid by Jefferson Warehouse and Cold Storage Company for all time spent by them in so doing. Some equipment of Chattanooga Warehouse and Cold Storage Company, such as pallets and fork-lift trucks were temporarily utilized at Birmingham and full payment for such utilization was made by Jefferson Warehouse and Cold Storage Company.

Warehouse receipts of Jefferson Warehouse and Cold Storage Company were issued in lieu of outstanding warehouse receipts of Thomas N. Nelson Company and Birmingham Ice and Cold Storage Company, with the result that no customer of either of the warehouses suffered any financial loss.

As of approximately August 1, 1958, Jefferson Warehouse and Cold Storage Company entered into an agreement with Southern Railway Company and its subsidiary, Georgia Industrial Realty Company, under and by virtue of which it proposed to pay, and did pay, rental upon a monthly basis for space actually occupied by Jefferson Warehouse and Cold Storage Company.

As of September 1, 1960, the report and order of the Interstate Commerce Commission in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609, became effective. The date of the report and order was October 6, 1959, but the effective date of

the rental base established thereby was September 1, 1960. By such report and order, the rentals ordered payable by Jefferson Warehouse and Cold Storage Company for buildings Nos. 2 and 8 were substantially increased.

Included in the rental base upon which rentals were to be calculated were rentals for expansion areas neither occupied, nor occupiable, by Jefferson Warehouse and Cold Storage Company, office space availiable for use by the general public and neither occupied, nor occupiable, by Jefferson Warehouse and Cold Storage Company, the cost of making repairs for latent defects in the cold storage systems, early construction costs which were incurred by Birmingham Terminal Storage Company and Thomas N. Nelson Company, with no benefit whatsoever to Jefferson Warehouse and Cold Storage Company, and the costs of engineering plans and specifications which were never utilized, and which were of no benefit to Jefferson Warehouse and Cold Storage Company.

Irrespective of the foregoing factors, which were incorporated in the rental base by the court below, except for Southern Bonded Warehouse Co. (the Court below dismissed the complaint as to this party) Jefferson Warehouse and Cold Storage Company was the only enant of any warehouse in the Birminghom Food Terminal facility which attempted to pay, and did pay, rental upon the basis of space actually occupied by it from and after September 1, 1960, under the formula prescribed by the Commission. From the time that Jefferson occupied space in the Birmingham Food Terminal facility until the date of the trial of the cause below it paid rentals in the amount of $711,084.62.

All equities contra notwithstanding, by the order of the court below, all other tenants were excused from

the payment of back-rental under the formula enunciated by the Interstate Commerce Commission *until from, and after May 2, 1962*, but Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., *were operated with the payment thereof from and after September 1, 1960.* Obviously, equity has not been done.

THE QUESTIONS ARE SUBSTANTIAL

This case is clearly one in which the lower court has abused its discretion in the exercise of its equitable jurisdiction. Although Jefferson Warehouse and Cold Storage Company, with one minor exception, has been the only tenant to have even made an effort to comply with the order of the Interstate Commerce Commission subsequent to September 1, 1960 by paying rental based upon the 8 and 10 percent theory of the Commission's order, it would nevertheless be compelled to pay yet additional rentals. Although Jefferson Warehouse and Cold Storage Company proved beyond question that it is a common and current practice in the leasing of warehouse space to do so on a basis of space occupied rather than entire space available (which proof in no way has been contradicted by either complainants or complainants in intervention who had every right to rebut said proof), the lower court has gone beyond the evidence of record to assess back rentals based upon the total space available in buildings Nos. 2 and 8. Where a federal court so manifestly abuses its equitable discretionary power, a substantial question to be reviewed by this Court is manifest.

A second substantial question is presented by the lower court's holding that an individual, who has no closer connection with transportation than merely being

the sole stockholder and president of a corporation engaged in the warehousing business, is a shipper, receiver, or person interested in or affected by the rate, regulation, or practice under consideration so as to come within the purview of the Elkins Act. Such holding by the lower court brings into question not only all warehousemen, shippers and receivers of freight, carriers, but any individual who is the sole stockholder or an officer of a corporation organized, existing and operating for a legitimate business purpose.

Still another question of substantial import requiring plenary consideration by this Court is whether the lower court erred in receiving any evidence and considering depositions taken in other cases and proceedings to which neither Jefferson Warehouse and Cold Storage Company nor W. C. Hudlow, Jr. was a party without any predicate having been laid therefor. It is beyond question that neither Jefferson, nor Hudlow, were parties to any of the litigation concerning the Birmingham Food Terminal until June 2, 1961 when the lower court ordered that they be joined as parties' defendant in this case as a result of the complaint in intervention. Yet, the lower court stated that it was "content to adopt such findings of fact as supported by the evidence adduced upon the trial of these cases" (*Shaw Warehouse Company* v. *Southern Railway Company*, I.C.C. decision, *supra*, *Southern Railway Company* v. *United States*, *supra* and *Shaw Warehouse Company* v. *Southern Railway Company*, federal court decision, *supra*). Both Jefferson and Hudlow have been estopped from presenting any evidence contrary to that submitted in the cited cases and have thus been completely bound, thereby without having been a party thereto. They have simply not had their day in court as guaranteed by the Constitution of the United States.

Yet another substantial question is presented by the lower court's abuse of its discretionary function in voiding a contract negotiated by arms length bargaining concerning the rentals to be paid by Jefferson, and in further including items of cost in the rental base which in no way inured to the benefit of Jefferson. Jefferson as an independent company without any prior part in the involved proceedings concerning the Birmingham Food Terminal had every legal right to negotiate with Southern Railway Company for a lawful leasehold contract. It is clearly substantial error for the lower court to force either Jefferson or Hudlow to pay an amount in excess of the terms of a lawful contract, particularly where the Interstate Commerce Commission in its decision did not declare such contract to be illegal.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

JAMES W. WRAPE
JAMES N. CLAY, III
2111 Sterick Building
Memphis 3, Tennessee
Counsel for Appellants

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N.W.
Washington 5, D. C.

APPENDIX A

28826

INTERSTATE COMMERCE COMMISSION

No. 32241

SHAW WAREHOUSE COMPANY V. SOUTHERN RAILWAY COMPANY ET AL.

Decided October 6, 1959

Certain of defendants' practices in connection with the operation of the Birmingham, Ala., Food Terminal found to result in injust discrimination, undue preferences and advantages, and departures from the defendant railroad's published tariff rates. Defendants ordered to cease and desist from such practices.

A. Alvis Layne, Jr., and *D. H. Markstein, Jr.*, for complainant.

E. L. All, James W. Hoeland, Philip M. Lanier, W. J. Sullivan, Jr., and *David J. Vann* for interveners.

Joseph F. Johnston, Winston B. McCall, William D. McLean, William S. Prichard, William S. Prichard, Jr., and *N. K. Snead* for defendants.

Daniel M. O'Donoghue for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Report of the Commission

BY THE COMMISSION:

Exceptions to the proposed report of the examiner were filed by the complainant and certain supporting interveners, to which the complainant and certain interveners replied. Our conclusions differ in part from those reached by the examiner. The issues have been orally argued be-

fore us. Exceptions and requested findings not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on July 25, 1957, as amended, the complainant, an operator of public dry storage warehouses at Birmingham, Ala., alleges (1) that the Southern Railway Company, hereinafter called the Southern or the defendant carrier, has made and granted undue and unreasonable preferences, advantages, rebates, concessions, and unlawful extensions of credit to and in favor of the Birmingham Food Terminal, a corporation, its stockholders, and persons using its facilities,[1] causing undue prejudice to and unjust discrimination against the transportation of property of the complainant, and persons using its facilities; and (2) that the Georgia Industrial Realty Company, hereinafter called the Realty Company, a wholly owned subsidiary of the Southern, and the Terminal Corporation, also named defendants herein, have caused, aided, and abetted these violations. We are asked to enter an order directing the defendants to cease and desist from the alleged violations. The Commission's Bureau of Inquiry and Compliance, hereinafter called the Bureau, and several other interested parties[2] intervened for various reasons.

The amended complaint, which differs from the original only to the extent of adding an allegation regarding extensions of credit by the defendant carrier to certain terminal tenants and of eliminating certain material relating

[1] Where reference is made hereinafter to the terminal it relates to the facility itself, including the buildings, driveways, spur tracks, *et cetera*, as distinguished from the corporate entity, sometimes called the Terminal Corporation.

[2] Birmingham Ice and Cold Storage Company, hereinafter called Birmingham Ice; Boggs Cold Storage Company, hereinafter called Boggs; Louisville and Nashville Railroad Company, hereinafter called the Louisville & Nashville; Harris Warehouse Company; and Harris Transfer Company.

to damages under section 9 of the Interstate Commerce Act, was filed with the examiner at the hearing on January 24, 1958. Copies thereof were furnished all parties of record, satisfying the requirement as to service. The amendment was received subject to the usual period allowed for filing replies, and the hearing was adjourned for 23 days to afford the parties opportunity to do so. No replies were filed, however, except that the Southern filed a motion to dismiss or, in the alternative, a motion to require the complaint to be made more specific. The amended complaint is sufficiently complete to inform the defendants of the issues involved and was filed in general compliance with our rules of practice. The motion does not show good and sufficient grounds to warrant dismissal of the amended complaint or to require further amendment or amplification thereof. Accordingly, the motion is overruled.

The Southern moves also to strike the brief filed by the Bureau, and to deny it the right to further participate in the proceeding on the grounds, (1) that by allegations made on brief and the requested findings therein, its participation unduly broadens the issues raised in the complaint, and (2) that it has improperly assumed an adversary position. In support thereof, the Southern refers particularly to certain violations of the provisions of section 1 of the Elkins Act alleged by the Bureau on brief which were not advanced in the complaint. It argues that the Bureau's presentation of evidence and prior participation in the proceeding fulfilled the function outlined by it in its petition for leave to intervene and fully discharged its duty in the public interest. It points out that there are pending before the Commission, in another proceeding, petitions by the Atlantic Coast Line Railroad Company and others for a general investigation of the practices of the Southern and the Realty Company as to the location and operation of food and produce terminals on its lines at Birmingham and elsewhere, in which proceeding it contends that

the Bureau might presumably have some right to argue as to the legality of the assailed practices. But it insists that, by selecting the vehicle of this proceeding to present its views, the Bureau has disregarded its professed role of protecting the public interest and has joined forces with the complainant in an effort to punish this defendant. This is alleged to be improper and a denial of due process to the defendant carrier.

By an order entered on November 19, 1957, we permitted the Bureau to intervene, and to be treated as a party to this proceeding, with the right to have notice of and to appear at the taking of testimony, produce and cross-examine witnesses, and be heard on brief and on oral argument, if the latter were granted, provided that the intervener would not introduce evidence which would unduly broaden the issues raised in the complaint. The Bureau denies that it has contrived to punish the defendant, and restates its position in this matter: namely, that its participation is for the sole purpose of protecting the public interest, by placing in evidence facts in its possession germane to the issue herein, should such facts not be developed by the adversary parties hereto, and to argue the legal effect of the facts of record.

The practices of the Southern here concerned were investigated by the Bureau in connection with the petitions for investigation previously mentioned. The facts developed, the Bureau asserts, disclosed practices of the defendant at Birmingham, among other points, which the Bureau considers may injuriously and unlawfully affect shippers and other carriers. Such of the facts developed by the Bureau that relate to the Southern's practices at Birmingham were made available to the complainant and introduced by the latter in evidence, without opposition by the Southern. The move obviated, to some extent, the necessity of considering petitions filed by the complainant for *subpoenas duces tecum* for the purpose of obtaining the same evidentiary matter directly from the South-

ern. It is in the public interest that these facts be a matter of record in this proceeding. The Commission is the guardian of the general public interest, and proceedings before it are not in the nature of private litigation, but are matters of public concern in which the whole body of shippers and carriers is interested. *Phillips Co.* v. *Grand Trunk W. Ry. Co.*, 236 U.S. 662; *United States* v. *Merchants & Mfrs. Traffic Assn. of Sacramento*, 242 U.S. 178, 188; *Jewelers' Protective Union* v. *Pennsylvania R. Co.*, 36 I.C.C. 71. As indicated, the facts alleged in the complaint charge unlawful preferences, advantages, concessions, rebates, and discriminations, and the evidence purports to establish violations of sections 2, 3, and 6 of the Interstate Commerce Act. While the same facts may constitute also a violation of the Elkins Act, our findings herein will be confined to the issues raised in the complaint. The motion to strike the Bureau's brief and bar its further participation is overruled.

The defendant carrier, on brief, challenges the complainant's right to complain of the assailed practices on the ground that the complainant is not alleged to be a shipper or receiver of freight in interstate commerce. Under the provisions of section 13(1) of the Interstate Commerce Act, "any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of" that part, in contravention of the provisions thereof, may apply to the Commission by petition. Warehouse companies who ship and received freight for their patrons and are themselves the consignors and consignees are "persons" authorized to lodge complaints with the Commission. *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 502. Consignment of freight to commercial warehouses such as the complainant's, and the services performed in receiving and unloading cars, handling of shipments, storage, and delivery, are integral and essential parts of interstate commerce. *Propriety of Operating Practices—New York Warehousing*, 198 I.C.C. 134,

138. Under section 13(1) a complainant, without regard to the nature of its interests, has a right to complain of anything done or attempted to be done in contravention of the provisions of the act, and to have its complaint considered on its merits. See *Amer. Warehousemen's Assn.* v. *Inland Waterways Corp.*, 188 I.C.C. 13, 16. The complainant's standing herein thus is well established, and we will proceed to a consideration of the merits of the complaint.

Development and construction of the terminal.—The terminal was designed for use by concerns or individuals engaged in the business of storing, processing, or distributing food, food products, or related commodities in the Birmingham area, and was intended to be a completely integrated food terminal. It contains 30 buildings, several driveways, vacant areas reserved for expansion of existing buildings, a restaurant, a gasoline filling station, and 16 railroad spur tracks, and occupies a rectangular area, which is part of the area formerly occupied by the Southern's Finley shops, extending eastwardly from a 15-foot alley just east of Fifth Street West for a distance of approximately 3,070 feet, with a width of 1,450 feet. It is bounded on the south by Finley Avenue and on the north by railroad tracks of the Southern.

The operation of the Finley shops was discontinued prior to 1952, and the 20 or more buildings used for that purpose were abandoned. They had deteriorated to an extremely dilapidated condition in the period prior to their demolition in 1955. During that period the Southern was exerting efforts toward the disposition of the land and the buildings to suitable parties for commercial uses which would produce additional traffic. In early 1954, after learning that the Jefferson County Truck Growers Association, hereinafter called the Growers Association, a local group of truck farmers, was searching for more spacious quarters outside the congested business section of the city for its produce market, the Southern initiated a study of the possibilities of utilizing some of its land for that purpose.

The defendants explain that demolition of the old buildings had not been completed when the terminal project began, and the old woodworking shop was not demolished under the contract let for that purpose. When the Growers Association evidenced an interest in the building, it was decided to recondition rather than demolish it. According to the defendants, the building, as it stood, was a blackened shell and even now it is said to be an empty shell containing only stalls for the farmers to sell their produce. The defendants assert that the Growers Association could have constructed some type of satisfactory enclosure for no more than it cost to recondition the existing structure. They argue, therefore, that nothing of value passed in the surrender of that building, and that, in fact, its utilization saved them the cost of its demolition. The defendants contend, further, that the Growers Association, not being a shipper or receiver of freight in interstate commerce, could not conceivably compete with the complainant or any of the interveners, and could not be the recipient of a rebate or the subject of discriminatory treatment. In this respect, the defendants' contention is supported by the evidence. It follows, also, that the Growers Association was not the recipient of a rebate or the subject of discriminatory treatment prohibited by the statute with respect to the other buildings occupied by the Growers Association or to the tracks adjacent thereto.

Although the Growers Association produces no rail freight traffic, the Southern felt that this group would form a natural nucleus around which a facility for freight-producing concerns could be built. It found that the produce dealers in Birmingham received approximately 4,000 carloads of fresh fruits and vegetables by rail in 1953. Based on that survey, the estimated potential annual volume of movement of this traffic over the Southern's lines to a facility served exclusively by it was at least 2,000 carloads. In its investigation, the Southern concluded that it would have little to gain if it did not serve the facility exclusively,

but might suffer a substantial loss of such traffic if service thereto was solely by another carrier. After deciding to promote actively the development of the facility on its own property, the Southern decided to expand this into a completely integrated food terminal which would greatly enhance the traffic potential. Since the terminal would be located outside of the reciprocal switching district of Birmingham, the Southern would be assured of at least a portion of the line-haul revenue on all freight moving to or from the facility. It was estimated that new revenue from this traffic would range from $300,000 to $500,000 a year.

Thereafter in 1954, through its officers and with the aid of others, the Southern began actual promotion and development of the terminal. Early in the promotion of the project, the defendants concentrated their solicitation on about six of the largest shippers in the food industry in Birmingham. The official having this responsibility let it be known that in his opinion circumstances and trade influences would then force others to come into the terminal. In the course of the negotiations, he observed to a promoter representing the Growers Association that the holdouts would "have to follow suit or wither on the vine * * *, or they would have to join the parade or perish."

The development of the terminal was facilitated by the incorporation of the Birmingham Food Terminal, under the laws of Alabama, on February 10, 1955. The paid-in capital of $2,000 constitutes its sole assets. It occupies no office space or other premises, maintains no employees or paid officials, and is a nonprofit organization. It is merely a corporate shell or conduit through which business between the Southern and the tenants may be channeled. The stockholders therein were prospective tenants of the terminal. Unless otherwise indicated, the designation "defendants," as hereinafter used, will refer to the Southern and the Realty Company only, although it is clear that the Realty Company is a creature of the Southern and its actions in this proceeding and in the transactions under investigation were those of the defendant carrier.

The original terminal plan contemplated the sale by the Realty Company to the Terminal Corporation of 84.935 acres of the plot of land previously described at about $2,500 an acre. In payment therefor, the Realty Company would accept a 4-percent second mortgage on which interest would be payable annually, but no principal payments would be due for the 25-year life of the mortgage. The Terminal Corporation would secure a construction loan from a lending agency for which it would execute a first mortgage on the land and improvements. The land and improvements would then be leased to the Realty Company for 25 years at a rental equivalent to the payments required by the first mortgage and the lease would be assigned to the lending agency as collateral security. Thereafter, the Realty Company would lease back the property to the Terminal Corporation for 25 years at a rental a nominal amount above that for which it was leased to the Realty Company. The property would then be sold to tenant-purchasers, subject to the mortgages and leases described. An agreement would be executed by the Southern guaranteeing the obligations assumed by the Realty Company. The Southern's guarantee was calculated to secure the most favorable terms from the lending agency.

Following the filing with us on September 26, 1955, and later, of petitions by the Atlantic Coast Line and others, previously alluded to, the lending agency, the Equitable Assurance Society, retracted a previously made commitment to grant a loan to the Terminal Corporation for the construction of the terminal. The impending inquiry by the Commission into the legality of the Southern's participation in the project had the effect of making other long-term financing unavailable. Construction of the terminal had already commenced early in 1955, and many of the prospective tenants had canceled existing leases or otherwise made commitments preparatory to moving to the terminal. Officials of the defendants felt responsible for the position in which the contractor and the prospective

tenants now found themselves, and sought means of relieving the situation. It was determined, therefore, that the Southern, through the Realty Company, would go forward with the construction of the project for its own account, and thereafter lease the facility to the Terminal Corporation. The lease was to be for a period of 5 years, with an option to renew, at a rental of $502,000 a year, the cost of utilities to be paid by the Terminal Corporation, and taxes, insurance, and certain maintenance costs by the Realty Company. Thereafter, on October 18, 1955, the defendant carrier assumed all of the Terminal Corporation's responsibilities in connection with the construction, including the financial obligations, in order to permit the work on the project to progress to completion.

An arrangement was entered into by the Terminal Corporation and the prospective tenants of the terminal whereby the Corporation leased parcels of the property to the tenants. It was clearly indicated therein that should the original sale plan be found lawful, steps would be taken to reinstate that plan. The rental program thus determined upon was to continue throughout the period of litigation. The lease stipulated that a percentage of the value of the land and the cost of construction of the buildings would be paid in rentals apportioned among the various tenants occupying the terminal.

Evidence relative to the original sales plan was presented by the complainant and the Bureau, and they request that we require its cancellation. As already noted, it was changed to a rental basis in 1955, and although there is strong indication that the sales plan may be revived by the defendants in the event of favorable disposition of pending litigation, such action by us at this time would be manifestly premature.

The buildings to be erected at the terminal were to conform to the specifications of the tenants. It was understood that the defendants would do what was necessary to get the buildings built and financed, would expend sub-

stantial sums of money for grading, drainage, and installation of utilities, and would construct and maintain tracks necessary to serve the various buildings.

As above stated, removal of some of the old shop buildings began in 1953. After it was definitely determined in 1954 to proceed with the development of the terminal, contracts were let for the removal of all except two of the remaining buildings. Their removal was completed, either late in 1954 or early in 1955, at a total cost of $27,000. One of the two remaining buildings, previously referred to, was remodeled for use by the Growers Association. The other, an old machine shop building, is unoccupied, and is located outside of the terminal area, just beyond the boundary line at the southeastern corner thereof. The cost of removing the tracks formerly maintained in the area, which was performed by the Southern's own labor force, is estimated at $10,000.

Tracks in the yards adjacent to the Finley shop area, the present terminal area, were on a substantially higher level than in the latter area. In the construction of a lead track from the yards to the terminal area, therefore, a great deal of excavation and grading was necessary. Prior to such excavation and grading, there was a gradual sloping of the terrain in the shop area from north to south. At the extreme south side adjacent to Finley Avenue it was approximately 14 feet lower than the north side adjacent to the Southern's tracks paralleling that side. In construction of the lead track adjacent to, and paralleling the north side of, the terminal and to permit the joining thereto of the 16 diverging spur tracks serving the various buildings in the terminal, the excavation of 14 feet of dirt for the half mile length of the track was necessary to place it on a level with the terminal. Some excavation in the northern portion of the terminal also was necessary to effect a leveling of the entire terminal area. In this work a large amount of excavated dirt had to be disposed of. It was scattered over the lower portions of the terminal area and

in the old machine shop building, and each 12-inch layer of dirt was compacted with a roller.

The grading was commenced in September 1955 and continued, with some interruptions, due to weather conditions, until the middle of 1956. The Hewitt Contracting Company was employed by the defendants under contract to perform the necessary grading work at a cost of $321,000. In addition, the defendants employed the S. S. Jacobs Company, hereinafter called Jacobs, to supervise the work, for which it was paid a fee of $26,000. Jacobs was originally engaged by the Terminal Corporation to construct the terminal buildings. Hewitt's work was interrupted at times because its equipment was too heavy for use when the terrain was extremely soft and muddy. In those instances, Jacobs itself performed some of the work with its lighter equipment. This entailed an additional expense to the defendants of $66,090.66. The total expense of grading was approximately $413,000. This and the demolition expense of $27,000 were not included in computing the cost of the terminal buildings used in the rental base. There were other expenses borne by the defendants which were not included in the rental base, as will be discussed later.

The laying of the tracks and all other work incident thereto were performed by the Southern with its own employees. The cost thereof was originally estimated at $158,000, but the final cost admittedly was greater. The absorption of this expense by the defendants is defended on the theory that it is customary for a rail carrier to provide team tracks to what it characterizes as an industrial park. The tracks are characterized by the complainant and certain interveners as private sidings. They extend from the lead-in track on the north side of the terminal southwardly to the extreme southern end of the building, and are laid parallel but adjacent to the buildings they serve. Each row of buildings is served by at least one track. The number of buildings in each row ranges from

one to four. There are four rows which contain four buildings each, but each of three other buildings is served exclusively by a track. Three of the tracks, identified as tracks numbers 3, 4, and 5, are not immediately adjacent to any of the buildings at the terminal, and two tracks are at the extreme western end of the terminal adjacent to building number 29 of the Growers Association.

As noted, the buildings were built to the tenants' specifications, subject to certain basic standards prescribed by the defendants for application to the building generally, such as type of construction, height, width, and uniformity in appearance. Private architects were employed by some of the tenants, but liability for payment of the fees thereof was assumed, subsequently, by the defendants. The amounts paid were charged to the cost of construction and were included in the rental base. During the course of construction, changes from the original plans were made by some of the tenants, which resulted in some additional expense. This, too, was included in the rental base. Such appurtenances or fixtures as utilities, wiring, air conditioning, machinery, et cetera, were installed by some of the tenants at their own expense.

Twelve terminal buildings contain either freezer or cooler space, or both, with the necessary built-in facilities and appurtenances, including special wall construction, insulation, and refrigeration machinery. Another building contains a built-in smokehouse. In the real estate field, buildings of this type are classified as single-purpose buildings. They are usually subject to higher rental rates or longer leases than are multiple-purpose buildings. Evidence concerning rental rates for both single and multiple-purpose buildings will be discussed later in more detail.

Other than the grading and the construction of spur tracks, Jacobs was responsible for the performance of most of the work incident to the construction of the terminal, including buildings, paving, retaining walls, curbs, storm drainage, and sanitary sewers, and the installation

of water and gas mains. Except for the direct cost of constructing the buildings themselves, the various items of expense will sometimes be referred to collectively herein as general items. In addition to those enumerated, they include performance bonds, builders' risk insurance, and the cost of land. The various phases of the work proceeded simultaneously with the construction of the buildings, where feasible. Retaining walls were necessary because of the dirt fills in the lower portions required to effect a leveling of the terminal. The total cost of paving, curbs, and retaining walls was $642,316.60, of which $538,718.36 was charged to the cost base. The remaining $103,598.24 was borne by the defendants. This does not include the cost of curbs adjacent to the spur tracks, which item of expense was included in the cost of the tracks, and was borne by the defendants.

As indicated, occupancy of some of the buildings began before all phases of the construction were completed, and in some instances before completion of the buildings themselves. The earliest occupancy was that of Thomas N. Nelson & Company, hereinafter called Nelson, on May 15, 1956. The uncompleted state of this tenant's building permitted only partial occupation and utilization thereof. It was some months later before the building, and the necessary utilities, driveways, et cetera, were completed. The next occupancies occurred on October 1, 1956, and others followed on later dates through November 15, 1957, when the terminal became fully occupied.

There are 22 direct tenants of the terminal, not all of whom are stockholders of the Terminal Corporation. They are listed in appendix A hereto, which also shows the assigned number of the building occupied by each, the total amount of space contained therein, the amount of freezer and cooler space, the costs proposed to be assigned to each building, the monthly rental, the annual rental per square foot, and the occupant's business. None of the subtenants are listed. The order of numbering observed in the map

of the terminal presented in evidence was from the east end of the terminal, graduating in numerical order of the buildings westwardly. All of the tenants listed are stockholders in the corporation, except Robert N. Nelson and Central Bag & Burlap Company. In addition to the dry or other storage space, buildings numbered 2, 5, 9, 12, 14, and 15 contain freezer space, and buildings 2, 3, 5, 8, 12, 14, 15, 18, 19, 20-A, and 20-B contain cooler space. All of them contain some office space, except 4 and 10.

Positions of complainant and supporting intervenors.—The complainant's allegations are, esentially: (1) That the promotion, design, and erection of the terminal facilities were planned and made possible only by the participation and valuable contribution of the Southern, for which no payment or consideration was or will be received; (2) that the facilities have been provided by the defendants to occupants and users at a compensation less than the cost or fair value thereof, and that the defendants intend ultimately to convey the facilities to the occupants and users for less than the cost or fair value thereof; (3) that the defendants have leased, furnished, and supplied the described facilities to shippers and receivers of property over its lines free or at charges substantially less than the fair market value thereof; and (4) that the foregoing practices constitute rebates and concessions to shippers and receivers of property who use the terminal facilities, including stockholders of the Terminal Corporation. Such practices, it alleges, also constitute unjust discrimination and undue and unreasonable preference and advantage to the Terminal Corporation, shippers, and receivers using the terminal, as against the complainant and other shippers and receivers not so situated; and such practices are also said to result in the transportation by the defendant carrier of the property of the Terminal Corporation and shippers and receivers using the terminal at compensation less than and different from the rates and charges specified in the defendant carrier's tariffs, which constitute a rebate or

remittance of some or all of the rates and charges so specified, and the extension to such shippers and receivers of privileges and facilities not authorized by such tariffs, in violation of the act.

Reference is made by the complainant to a variety of methods by which the defendants are alleged to have extended preferences, concessions, and advantages to the persons associated with the terminal, but which are not available to the shipping public generally. They may be grouped into the following categories: (1) By a guarantee of credit to obtain lower interest rates and terms on loans; (2) by extending rates and terms of rental below fair market value and compensatory levels; (3) by a reduction of the purchase price and rentals through the defendant's contribution to the terminal's development; (4) by the failure to collect rentals; (5) by means of miscellaneous items, including circulation of advertising or solicitation of customers by the defendants for terminal occupants; and (6) by an unlawful extension of credit on freight charges.

In their petitions for leave to intervene, Birmingham Ice, Boggs, Harris Warehouse, and Harris Transfer adopt the complainant's allegations and request similar relief. Birmingham Ice and Boggs also offered evidence in support of these allegations.

In its petition for leave to intervene, the Louisville & Nashville alleges that the practices of the defendants caused several concerns, previously located on its lines, to relocate at the terminal, and that it has a real interest in fully participating in the proceeding for the purpose of determining if it can lawfully avail itself of the same or similar practices to gain traffic. It was represented at the hearing, but presented no evidence. It filed a brief on the evidence concerning the defendants' practices which it suggests are of doubtful legality. We are requested to make findings which would indicate the lawfulness or unlawfulness of the various practices discussed in the brief.

The complainant operates two public dry storage warehouses in Birmingham, both of which are served exclusively by the defendant carrier. The principal one was originally leased from the B. H. S. Company, until the complainant absorbed the latter in June 1955, and contains 27,000 square feet of dry storage space and 4,500 square feet of office space, for which the complainant paid an annual rental of $23,000, or approximately 73 cents a square foot. It is located at 115 South 35th Street, and was constructed in 1951 on a plot of land comprising approximately 3 acres, which was originally purchased from the Southern at a cost of more than $10,000. The cost of construction was $190,000. A spur track was constructed to serve the facility, for which the Southern was paid approximately $4,200, including all the expenses incident to laying the track from the switch point of the defendant carrier's track to the end of the spur, about 500 feet.

In the spring of 1955, the construction of an addition to the main warehouse building was commenced and, with this addition, storage space of the entire building was increased to approximately 60,000 square feet, and the total office space comprised about 9,400 square feet. The cost of this addition, together with that of the initial building, aggregated approximately $400,000. This addition required an extension of the spur track, entailing an additional expense to the complainant of $1,064. The complainant's rental was adjusted to $41,000 a year, or approximately 59 cents a square foot for the total of 69,400 square feet occupied.

A supplemental warehouse located at 607 North 35th Street is operated by the complaint nader a lease from the Birmingham Realty Company, which was taken over from the General Motors Corporation in May 1957. The building is occupied largely by the Frigidaire Division of General Motors, buf a limited portion of it is used by the compainant for storage purposes.

In its operations, the complainant stores merchandise for national concerns and distributes it either in its own

trucks or direct from its warehouse, where it is picked up by the ultimate customers themselves. Some may be placed in storage awaiting sale. Normally the manufacturer pays all the charges, but if the goods are sold f.o.b. warehouse, the complainant's charges are collected from the ultimate customer. Separate charges are made for the services of handling, storage, delivery, and for miscellaneous services. Office space for manufacturers who store goods in the warehouse also is provided by the complainant, for which there is an additional charge. All except one or two customers using the complainant's warehouse are engaged in the food business. Its annual volume of traffic exceeds 1,000 carloads, whereas prior to the 1955 addition it ranged from about 700 to 800 carloads.

The complainant was represented at some of the early terminal promotional meetings held in 1954 and 1955, wherein the defendants were seeking tenants. Despite the attractiveness of the offers extended to prospective purchasers or tenants, the complainant indicates that it was unable to consider removing to the terminal because it had a large investment to protect.

The complainant states that it has been adversely affected by extra services offered and performed by at least one of the tenants, Nelson. A brochure advertising such offers was distributed widely among potential customers, including those of the complainant, as early as January 1955. As a result of persistent pressure arising from such offers for future patronage, the complainant was forced to reduce its rents about March 1, 1955, in an effort to hold its customers. This early action was taken because delay until completion of the terminal was considered unwise. Although the complainant still receives requests for the performance of extra services, it has steadfastly refused to meet that competition because the heavy additional expense thereof would allegedly render its business unprofitable. The complainant's annual gross revenue for each of the years 1953 through 1956 was approximately $240,000,

and for 1957 it was about $275,000, but its profit was greater in 1953.

Another factor cited as important by the complainant is the large concentration of the food business in one terminal. The magnitude of the terminal, it asserts, favorably impreses representatives from other cities, which reacts to the complainant's disadvantage and detriment in obtaining new customers. During the construction of the terminal, a new storage-in-transit operation at Birmingham was inaugurated by the Colgate-Palmolive-Peet Company. This account was actively solicited by the complainant, but it went to one of the warehouses at the terminal. The complainant believes that the situation, if not remedied, will ultimately cause its complete collapse. It cannot survive in a competitive struggle with the competitors in the terminal, it declares, because of their advantageous positions and the benefits from the defendant carrier's financial strength. The fact that the deterioration of its situation has been somewhat gradual rather than sudden, the complainant urges, does not minimize its seriousness or the need for relief from the inevitable result. It points out that, while customers may be slow to switch from one warehouse to another, they will not ignore the economies offered, and once a change is made they rarely return to the former warehouse.

Birmingham Ice has operated a cold storage warehouse in Birmingham for more than 40 years, and owns the seven-story building which it occupied. The machinery furnishing the cooling and refrigeration services therein is located in another building directly across the street from the warehouse. The warehouse contains both cooler and freezer space which aggregates approximately 832,000 cubic feet. Of the various commodities stored, frozen fruits and vegetables are the principal ones, revenuewise. Next in importance are meats and poultry in the order named. The approximate annual gross revenues of the warehouse in 1955, 1956, and 1957 were $238,000, $268,000, and $254,000,

respectively. This intervener asserts that the loss in revenue in 1957 was due to a lower volume of business and to reductions in the service charges per 100 pounds to meet competition of the terminal.

According to Birmingham Ice, its business has suffered severely from the competition of warehouses in the terminal. It declined from 80 percent of capacity in 1956 to 50 percent in 1957. All of its rates have been reduced to retain customers. It has lost several important customers, such as the Great Atlantic & Pacific Tea Company, Hill Grocery Company, Star Provision Company, and the Minute Maid Corporation. This intervener maintains that the described decline in its business was due chiefly to the loss of customers and not to the business recession. It declares that the decline in the volume of business of the remaining customers has been negligible. The full effect of the competition was first felt for the year 1957.

The defendants contend that the intervener's alleged inability to compete with the modern warehouses in the terminal is due to the obsolescence of its plant. They point out that the intervener's building, being a multistory structure, is less efficient than the single story warehouses in the terminal, and is subject to heavier maintenance expenses. Effectuation of the competitive position sought by the intervener, the defendants indicate, would nullify the advantages to the public resulting from the new and modern facilities, and could not be justified. The validity of the defendants' position must assume that the advantages of the latter facilities result solely from their claimed efficiency and not from failure to bear the full cost of providing them.

Three public cold storage warehouses were operated in Birmingham prior to the construction of the terminal. Their storage sapce aggregated 1,800,000 cubic feet. With the completion of those erected in the terminal, the available space in Birmingham was virtually tripled. These additional facilities, this intervener claims, have materially

affected the cold storage business in Birmingham. It points out that all such warehouses in the Southeast are made competitive by the storage-in-transit privileges offered.

After learning of the proposed project, Brimingham Ice appealed to the officials responsible for its promotion in an effort to dissuade them from the construction of any additional cold storage facilities in the Birmingham area. It attempted, without success, to convince them that there already was a surplus of such facilities, and that any addition thereto would foster a destructive competitive situation and result in a rate war. The industry normally operates on a very narrow margin of profit, and Brimingham Ice contends that the construction of additional facilities was unsound economically.

Birmingham Ice's approximate annual gross revenue from four accounts, Atlantic & Pacific, Hill Grocery, Star Provision, and Minute Maid, were $8,000, $10,000, $10,000, and $12,000, respectively. The last-named customer had patronized this intervener's warehouse for about 10 years, and revenuewise was a very important and desirable customer. The reduction in its rate of occupancy resulting from the loss of these accounts forced it to reduce its clerical employees from 3 to 2 and its labor force from 10 to 8.

At the time of the hearing, Boggs[3] owned and operated a cold storage warehouse in Birmingham, which contained both cooler and freezer space. Construction of the initial portion was completed in 1948, and an addition thereto was completed on January 17, 1955. This intervener instanced the following items as determinative of a fair annual rental rate on the facility: Depreciation $14,419.20;

[3] By a petition filed after the hearing (on June 2, 1958), the participation of Boggs in this proceeding was withdrawn "on the ground that Boggs has been eliminated from the public cold storage warehouse business in the Birmingham area as a result of the unlawful practices of the defendants," and that "Boggs has sold the physical facilities used by it at a substantial loss to a purchaser which is not and will not be engaged in public warehousing in Birmingham."

insurance $1,654.19; repairs $3,934.10; property taxes $3,261.60; interest on mortgage $7,759.14; and a return on net investment of $13,041.33, computed at the rate of 6 percent. The investment account consits of $24,622.25 for land, $238,653.90 for building, and $86,732.23 for machinery and equipment, aggregating $350,000.38, less $132,652.84 for a mortgage, or a net investment of $217,355.54. The net book value of the land and building is $200,916.54. The depreciation schedule is based on a life of 40 years for the old portion of the building and 50 years for the new portion.

Construction costs and the rental base.—Of the total cost of $1,202,170.81 for the general items, $347,528.28 was allocated to the Growers Association. This is said to be based on the actual cost of such items of expense incurred in the area occupied by that association, comprising about 24.286 acres. The remainder was allocated to the other tenants in the terminal on the basis of 58.5 cents per square foot of space contained in their buildings. Only a negligible proportion of the general items for the space outside of their buildings, such as driveways or that reserved for expansion, was charged to the tenants. Virtually all of that space and the proportionate general items of expense, aggregating 670,715 square feet and $392,816.06, respectively, were allocated to the Realty Company. These expenses were borne by the defendants. It had the effect of further reducing the total annual rental for the terminal from $586,000 to $554,820.

The space allocated to the Realty Company embraces most of the open spaces such as dirveways and areas reserved for tenant expansion. Portions of this space are used more or less exclusively by some of the tenants in connection with their business without cost to them. Generally, such utilization is for parking vehicles or outside storage.

The indicated cost of remodeling the woodworking shop building was $70,000, which constitutes the sole item of

cost included in the rental base used with respect to that building. This basis includes nothing for the original cost of the building or for its book value prior to remodeling, said to be $69,350. There is no breakdown as to the various items of expense incurred by Jacobs in the remodeling work. Only the above-mentioned amount received by Jacobs from the defendants is shown.

Another substantial item of the defendants' cost absorption, referred to by the complainant, involves the engineering and development services performed by their own employees and officers. For example, there was an item of $13,902.34 for engineering labor and blueprints which was absorbed. This amount does not include the extensive engineering services of the chief engineer's office, such as supervising the construction, preparing plans, et cetera. To afford some conception of the magnitude of the cost thus absorbed, the complainant cites the defendants' estimated cost of $51,550 for engineering and contingencies in connection merely with grading, drainage, removal of the old tracks, and laying new ones.

Appendix B hereto shows the construction costs comprising the rental base as computed by the defendants. All costs included in the rental base are segregated, for accounting purposes, from other incidental costs by allocating them to the Realty Company, it having been delegated the responsibility of administering rentals. Other costs incident to construction of the terminal not so allocated are charged to the account of and borne by the defendants. This appendix shows a total cost of $7,327,862.02, but, as already noted, there was deducted therefrom $392,816.06 for general items charged to the Realty Company which was absorbed by the defendants. The remaining net rental base is $6,935,045.96.

Appendix C hereto shows a summarization by the complainant and certain interveners of all costs incident to the construction of the terminal, including both those comprising the rental base and the others not included therein. It

shows a total of $8,636,059.88. Listed therein are costs aggregating $1,325,151.23 represented as having been absorbed by the defendants. These costs include land, grading and supervision thereof, demolition of buildings, gas mains, paving and gutters, laying tracks, removal of old tracks, and promotion and engineering expenses. The cost of $465,854 for land is based on 102.192 acres at $4,500 an acre, as opposed to the defendants' stated cost of $212,337.50 based on $2,500 an acre for 84.935 acres. These bases present a wide discrepancy which will be discussed hereinafter in greater detail. There being no dispute as to the accuracy of the other items, the only question presented as to them is whether they should be included in the rental base. There is support for the defendants' position that the expense of removing the tracks and razing the buildings would have been incurred without the construction of the terminal. It is clear, however, that the other items of expense were incurred solely as a result of the terminal's construction.

Appendix D hereto summarizes the costs which the complainant insists should be included in the rental base, and presents its proposed formula for determining the rental rates. The total cost of $8,636,059.88 shown therein is the same as that appearing in appendix C. It is broken into two major categories, one for construction costs, and the other for land costs. The total construction cost of $7,730,115.22 is subdivided as to refrigeration and nonrefrigeration construction, resulting in costs of $6,333,816.46 and $1,396,298.76, respectively. Land costs aggregating $905,944.66 include those for the land itself, based on 102.192 acres valued at $4,500 an acre, for demolition of buildings for grading, and for supervision by Jacobs.

The proposed rental formula provides rates based on aggregate costs for nonrefrigeration and refrigeration construction, and for land, of 10, 20, and 8 percent, respectively. The complainant estimates that these rates would produce total annual and monthly rentals of $985,116.97 and

$82,093.08, respectively. The respective totals produced by the base and rate applied by the defendants are $554,820 and $46,235, or approximately 56 percent of that resulting under the complainant's formula.

As of August 1, 1957, when the full rental base was declared operative, the total net cost used in determining the base, as indicated, was $6,935,243.96. It includes the actual cost of the buildings or portions of buildings occupied by the tenants, plus allotments for general items. In assembling and pricing the various items of expense, a value of $2,500 per acre was assigned to the land. Rentals are based on 8 percent of the costs thus determined.

The complainant argues that both the 8 percent rate and the cost base used are too low. It contends that the failure to include in the cost base all expenses incurred in the construction of the terminal, and the use of an improper rate, result in unreasonably low rental charges. In support thereof, it presented evidence concerning practices normally observed in determining proper rental rates, such as land value, length of lease, reliability of the tenant, cost of building, and type of building, whether single or multiple purpose. Testimony as to these matters was presented through two witnesses engaged in real estate business in Birmingham. One is president of the largest real estate firm[4] in the city, and the other is the senior partner in a large real estate firm consisting of several departments. The operations of these concerns embrace all phases of the real estate business, including sales, rentals, management, construction, mortgage loans, insurance, and surety bonding.

The firms represented by those witnesses have constructed numerous buildings in the South for various national concerns, as well as for local tenants. They usually require a lease for at least 10 years. In the case of a

[4] The predecessor of this firm was organized in 1871. It and its successor have participated in the city's development throughout its existence.

national concern which limits its leases to 5 years, however, they may accept a 5-year lease on a firm promise to renew it for an additional 5-year period. The financial standing of the tenant has a substantial effect upon the rate to be applied. National concerns are preferred. A standard return where the lease runs for 15 years or longer for a top rate tenant, they say, is 10.5 to 11 percent on the actual cost of constructing the building, including architect's fee, the engineering fee, and the cost of paving the off-street area, and 8 percent on the value of the land. They consider 10 and 8 percent as the minimum, and it is limited to multiple-purpose buildings. In real estate parlance, it is frequently called the 10 and 8 formula. They claim that this basis will yield only about 3 percent net return on investment. As noted, the gross return on the buildings in the terminal is 8 percent on both the value of the land and the cost of the building.

These witnesses indicate that it is rather unusual for the owner of a building to install equipment, such as smokehouses and refrigeration machinery, as was done in some of the buildings in the terminal. In addition to a fair return on single-purpose buildings, it is customary to recover the cost of the special-purpose equipment during the initial term of the lease. On a refrigerated building, they believe the initial lease should run for about 20 years, and the rental rate should be higher than that normally applied to multiple-purpose buildings. The average annual rental value in Birmingham, according to them, is 70 cents a square foot for dry storage. For buildings containing sprinkler systems the value is about 5 cents more annually. This is compared with a value of about 43 cents for some of the buildings in the terminal equipped with sprinkler systems.

Some indication of rentals being paid in Birmingham for warehouse facilities may be obtained from the testimony of some of the tenants at the terminal as to rentals previously paid by them. Nelson, lessee of building No. 2 as shown

in appendix A, had leased some 25,000 square feet of dry storage space in Birmingham at a rental amounting annually to $5,400, or approximately 22 cents a square foot. The property had wooden floors, and Nelson conceded that this detracted from his being able to store and operate heavy equipment. The president of Flint Refrigeration Company, building No. 17 at the terminal, testified that his company had leased 8,000 square feet of space at an annual rental of $6,000, or about 75 cents a square foot. Another property comprising 7,000 square feet had also been leased at $3,000 a year, or 43 cents a square foot, but the latter was said to be about 40 years old and in bad condition. The witness described still another property containing 5,000 square feet, located in a basement, which had been leased at either $1,320 or $1,500 a year, or from 26 to 30 cents a square foot. The last described property was said to be very old and unsatisfactory.

The secretary-treasurer of W. L. Smith Poultry Company, building No. 5 at the terminal, stated that his company had occupied approximately 7,000 square feet of space in Birmingham at an annual rental of $6,000, or about 86 cents a square foot. The S. T. Jarrell Company, building No. 6 at the terminal, had occupied from 7,500 to 8,000 square feet of space in Birmingham for $3,900 a year, or from 40 to 52 cents a square foot. About half of this space was balcony space with limited storage capacity owing to a low ceiling. The tenant at building No. 11, Bruno Food Stores, had previously leased about 12,000 square feet of space in a building described as more than 20 years old at an annual rental of $6,000, or 50 cents a square foot. The Alabama Potato Service, tenant at building No. 3, had occupied approximately 5,000 square feet of dry storage space at an annual rental of $3,000, or 60 cents a square foot. The building was more than 20 years old and had in fact been condemned at the time this tenant moved.

The George Espy Produce Company, which occupies building No. 20-A at the terminal, had previously occupied between 1,500 and 1,800 square feet of refrigerated storage space in Birmingham for $1,560 a year, or between 87 and 101 cents a square foot. It had also leased 1,800 square feet of dry storage space at $780 a year, or 43 cents a square foot. This tenant subleases 12,500 square feet of its space at the terminal, including 2,000 square feet of cooler space, for which it receives $8,040 a year, or 64 cents a square foot. It subleases another 3,000 square feet for $1,800 a year, or 60 cents a square foot.

From the foregoing, it is clear that the basis of 8 percent of the value of the land and cost of the buildings at the terminal utilized by the defendants in constructing the rentals was and is unduly low, as compared with the basis generally used in and around Birmingham in constructing rentals on like property, namely, 10 percent of the cost of construction and 8 percent of the value of the land. In addition, complainant and certain interveners would include in the rental base an amount equivalent to 20 percent of the costs of special-purpose equipment, such as refrigeration equipment, and of special construction in the single purpose buildings. This matter will be discussed hereinafter. The defendants adduced no substantial evidence in rebuttal. On brief, they ascribe as prejudicial error the examiner's failure to receive as exhibits, over objections of the complainant, a letter and related correspondence purporting to show that the 8-percent rental rate had the approval of this Commission. The letter, dated May 3, 1954, was from the director of the Commission's Bureau of Inquiry and Compliance in response to an inquiry. This was an informal opinion of the indicated official based on an informal investigation made prior to construction of the terminal, and hence without the benefit of the actual costs later incurred thereon. Thus, it clearly had no evidentiary value and was properly rejected.

The value of the land in the terminal area, before any grading was done, is estimated by one of the witnesses to have been about $4,000 to $5,000 an acre. He claims that by the subsequent improvements the value was increased to its maximum efficiency. On April 19, 1954, the defendant carrier's real estate department tentatively suggested a value of $3,267 an acre for the bare land, exclusive of any tracks, buildings, or other improvements then located thereon. The subsequent reduction to the $2,500 value placed on it initially for disposition to the tenants and finally for rental purposes, the defendants explain, was necessary because it represented the maximum that could be realized in the project. There are varying opinions among the complainant and interveners as to the minimum value that should be allocated to the land, ranging from $3,600 to $4,500 an acre. The $3,600 figure is based on an average of the foregoing estimates of $3,267 and $4,000. Any lower figure, they argue, would constitute a concession in favor of the tenants.

Real estate values are subject to variables such as business conditions, varying demand, and diverse values in the same locality. Thus, they are rendered difficult to determine by a fixed formula. The defendants show that several years ago the Acme Steel Company failed to exercise an option to purchase a 15-acres parcel of land adjacent to the Finley shop property for $2,200 an acre. This fact and the inability to dispose of the Finley shop property prior to its utilization in the terminal project tends to support the defendant's position that the $2,500 value placed on it was the maximum that could be realized on the land. The evidence is not sufficiently comprehensive, and does not contain the necessary degree of exactness, to support a finding that the land value employed by the defendants in computing rentals was unduly low.

A device used by the defendants for further reducing the allocated land value is the exclusion from the rental base of the land other than that under the buildings, such

as the vehicular and expansion areas, driveways, and that under the tracks. The discrepancy between the 102.192 acres used by the complainant and the 84.935 acres used by the defendants in their respective computations of the rental base results from the defendants' exclusion therefrom of the described areas. As noted, some of those areas are being utilized by tenants. In these instances, where the availability and utilization of these areas is an essential part of the occupancies, they properly belong in the rental base as to those tenants. Land under the spur tracks should be included in the cost of the tracks, and be allocated proportionately to the rental base of the tenants using the tracks.

As indicated, several items of expense incurred in the construction of the terminal were absorbed by the defendants and are not included in the rental base. Principal among them are those for grading, supervision of the grading, gas mains, tracks, and promotion and engineering expenses. Absorption of those for demolition of the shop buildings and removal of the tracks appear proper for the reason previously noted. Also, the costs incident to the grading and construction of a lead track to a point from which it may serve a facility such as the terminal may properly be absorbed by a carrier. We emphasize, however, that this does not include the cost of grading the terminal area, and this cost should be reflected in the rental base as such, or as enhanced value of the land as graded. With the additional exception hereinafter indicated, all other costs incident to construction of the terminal properly belong in the rental base. As previously stated, the spur tracks identified as numbers 3, 4, and 5 are not immediately adjacent to any of the buildings at the terminal. Their location is conducive to their use as team tracks, and the absorption of their cost by the defendant carrier appears justified. Also, for reasons noted, the tracks adjacent to the building of the Growers Association canont be the subject of a rebate or concession.

However, with respect to the defendants' claim that the remainder of the tracks in the terminal are team tracks, the nature of the tracks in question, their use, and their locations preclude a finding that they are other than private sidings. Construction and maintenance of tracks by railroads to serve particular shippers such as those furnished to the occupants of the terminal have been determined to be in violation of the act. In *Switching at Richmond, Va.*, 245 I.C.C. 293, 300, we concluded that the cost borne by a railroad of providing and maintaining private sidings for some industries and not others was unduly preferential in violation of section 3(1) of the act. A similar conclusion is warranted on the facts adduced in the instant proceeding.

Collection of rentals at the terminal.—The construction work and improvements were declared to be completed as of August 1, 1957, on which date full rental rates became applicable. In May 1956, construction of some of the buildings had been partially completed, and they were beginning to be occupied by the designated tenants. From then to August 1, 1957, rentals on the occupied buildings were computed on the basis of the estimated percentage of their completion at the beginning of each rental period, which generally was for 1 or 2 months, proportionately related to the cost thereof. For example, if a building and necessary facilities were 60 percent complete, the rental charges would be 60 percent of the rental rate based on completed construction and costs as of the date involved. As the percentage of completed construction and cumulated costs increased, monthly rental likewise increased. These varying rentals were covered by interim lease agreements for 1 or 2 months during the period of construction. In numerous instances, those charges were based on negotiations with the individual tenants which resulted in much flexibility in the determinations. The charges thus determined, the complainant and interveners allege, were unreasonably low.

In virtually all instances, there were lags of several months in the collection of rentals, which the complainant contends resulted in concessions and advantages to those tenants. On January 21, 1958, all of the tenants were in arrears since September 1957, or earlier, and the arrearage of Nelson exceeded a year, or more than $135,000, including an unpaid note. This tenant had paid rental only for approximately 2 months during its entire occupancy. There was a log of several months in that payment. No rent was charged for the period from May 15 through July 31, 1956. On February 10, 1958, the defendants instituted an action in the Federal district court in Birmingham to collect this accrued rental charge.[5] As of February 27, 1958, the arrearages of all the terminal's tenants aggregated approximately $335,000, but no action had been instituted to collect rentals from any other tenants or to eject any of them.

The lag in the collection of rentals during the period of construction, the defendants indicate, was due to the difficulty of ascertaining the accumulated costs essential to the computation of the charges. The defendants received income from the early occupancies which they would not have enjoyed had the occupancies been deferred until construction was completed. It appears that those occupancies were mutually beneficial to the defendants and the tenants.

As stated, as of January 21, 1958, all of the tenants at the terminal were in arrears since September 1957, or earlier. The discontinuance in the payment of rentals by the tenants stemmed primarily from their dissatisfaction with the final determination by the defendants as to the costs on which the rentals were to be based after August 1, 1957. According to the testimony of several tenants, the failure to pay rent was calculated not only to force favorable resolution of the controversy regarding these

[5] On or about July 1, 1958, the Southern acquired the Nelson stock through an intermediary and operates it under the Nelson name.

costs, but also to obtain assurances that they would be given the right to purchase their buildings. A meeting of the tenants was held on January 22, 1958, at which they agreed to pay rental arrearages of at least 2 months as a sign of their good faith in the project, and some $52,000 in arrearages was subsequently remitted to the defendants. In general, the tenants believe that they will be accorded credit for rental payments toward the purchase of their respective buildings, and that no portion of the cost of providing the spur tracks in the terminal will be reflected in their purchase prices. Some expressed disappointment with results at the terminal, and indicated that they would vacate their buildings if the cost-basis controversy were resolved unfavorably to them.

There was testimony by some tenants, however, that they failed to pay rent simply because they were not asked to pay. The general manager of the S. T. Jerrell Company, which occupies 17,500 square feet of space at the terminal, testified that his company received no bill covering rentals subsequent to September 1957, and that it was his practice not to pay until billed. He further testified: "If they send us a bill tomorrow for what we owe them we'll pay it." An official of the Birmingham Terminal Cold Storage Company, another tenant, testified that he had not been asked to pay his rent. He acknowledged that there was a controversy over the total cost of the project and the allocation thereof among the tenants, but denied that the controversy was the cause of his failure to pay rent. He testified further that the cost allocated to the construction of his building had never been explained to him, and that if it were satisfactorily explained to him he would pay his rent. Another witness, the president of the Alabama Paper & Metalware Company, testified that he had received no communication from the defendants with respect to his failure to make rental payments; that he stopped paying rent because he "could not see any point in us paying rent when the other people were not paying rent"; and that he

would resume payments when the others resume payments. Several other witnesses testified that no demand for payment had been made on them, but that they were willing to make rental payments only on a cost basis satisfactory to them. Others testified that they would make rental payments only after a clarification of their rights to purchase their buildings.

The president of Nelson, whose arrearages as of January 21, 1958, as previously stated, exceeded $135,000, flatly stated that regardless of any controversy he could not have paid his rent at any time. So, also, was the testimony of the president of the Alabama Potato Service, who stated that while he paid up 2 months' arrearage at the time the other tenants did, he could not have paid the entire amount. He testified also that up to that time he had not been asked to make payment.

In the light of this testimony, it is clear that the defendants made no reasonable effort in the instances described to effect timely collection of rentals, and that their continued failure to collect rentals was unjustified. The net result was the extension to such lessees by the defendant carrier of privileges and facilities other than those specified in its tariffs.

Alleged extension of credit.—The Bureau presented evidence of extensions of credit on freight charges made by the defendant carrier to four tenants at the terminal. Section 3(2) of the Interstate Commerce Act provides, among other things, that no carrier by railroad shall relinquish possession of freight until all charges thereon have been paid, except under such rules and regulations as may be prescribed by the Commission. By appropriate regulations, we have provided that carriers may relinquish possession of carload freight and extend credit for the charges thereon for a period of 48 hours, when such carriers have taken precautions deemed by them sufficient to assure payment of the charges, and that where retention of the frieght would retard prompt delivery or prompt release of equip-

ment, the carirers, after taking due precautions, may extend credit for a period of 96 hours.

An agent of the Bureau investigated the records of the defendant carrier at Birmingham for the period September 1956 to July 1957, and testified as to 20 of the most aggravated instances out of 100 extensions of credit found to have been made by the carrier during that period. The extensions instanced ranged from 5 to 25 days beyond the 96-hour period. Carloads of freight were released without payment of charges to Nelson, for example, on January 28 and February 2, 1957, when payment had not yet been made by Nelson on freight released on January 21, 1957; and despite the fact that Nelson had withheld payment for periods up to 14 days beyond the 96-hour limit on previous shipments. Seven or more subsequent extensions of credit were made to Nelson although that company was then in arrears on rental payments. Freigh. was released without payment of freight charges to the Magic City Produce Company on January 11, 1957, while that company was delinquent in the payment of freight released to it on December 27, 1956. The facts clearly indicate unwarranted extensions of credit in contravention of our regulations.

GENERAL DISCUSSION AND CONCLUSIONS

When the acquisition of freight traffic is an object, the furnishing of facilities to a shipper or receiver by a railroad at less than the fair value thereof violates the provisions of sections 2, 3, and 6 of the Interstate Commerce Act. *Union Pac. R. Co. v. United States*, 313 U.S. 450, hereinafter referred to as the *Union Pacific* case. The unlawful practices are prohibited regardless of the means employed or devices used by the offending railroad, and the assailed practices of the defendant carrier in the instant proceeding, if unlawful, are no less so by reason of the fact that they are carried out through the use of the Terminal Corporation as an intermediary.

In *Baltimore & O. R. Co. v. United States*, 305 U.S. 507, hereinafter referred to as the *Baltimore & Ohio* case, de-

cided prior to the *Union Pacific* case above cited, the Commission had entered an order directing certain carriers to cease and desist from permitting shippers to occupy space by lease or otherwise in warehouses owned or controlled directly or indirectly by, or affiliated with, the carriers concerned at charges which failed to compensate those carriers for the cost of providing the facilities. One carrier had also been directed to abstain from granting concessions to a warehouse company by means of leasing space to the latter at less than the cost of the space to the carrier. The Supreme Court, in reviewing the refusal of the lower court to grant an injunction against the enforcement of the Commission's order, noted that the carriers' warehousing activities were solely to induce shippers to use particular rail facilities, and that a shipper who could secure transportation and storage together from a carrier and its affiliates for an aggregate cost which was less than the sum for which he could secure such services when purchased separately from carriers and nonaffiliated enterprises, would ordinarily deal with those offering the best terms. The Court concluded that a saving so obtained on the nontransportation service is the equivalent of a rebate on the transportation service, and that when a carrier furnishes nontransportation services below cost in an effort to acquire rail traffic, it constitutes a violation of section 6(7) of the act, which forbids carriers to remit by any device any portion of the published rates for transportation.

In the *Union Pacific* case, a city undertook to construct, operate, and own a food terminal, and a carrier, which alone served that city, took a leading and dominant part in the undertaking for the purpose of acquiring traffic. At the instance of the Commission, the lower court enjoined the rental of facilities at the terminal on a basis lower than that calculated to return the full cost of construction thereof. The Supreme Court modified the order by substituting the formula of fair rental value for return of full cost. In so doing, the Court stated that this was not a case for the

rigid rule applied in the *Baltimore & Ohio* case, which was designed to root out competitive evils in discriminatory warehousing indulged in by carriers in an effort to acquire traffic, and that the city was entitled to develop its properties for civic advantage so long as it did not utilize its facilities in furtherance of a scheme to obtain customers for a carrier. The Court concluded that the construction of rentals on the basis of the fair rental value of the facilities would avoid the discriminatory evils proscribed by the act. Among the factors to be considered in determining fair rental value, the following were enumerated: the going rentals for like facilities, the rentals prospective tenants are willing to pay, the normal return on capital employed in like enterprises, the overall cost and value of the properties, and the cost of providing the facilities. The latter factor was said to be "persuasive, not determinative."

While the facts in the *Union Pacific* case were somewhat different from those here, we believe that the standard there used may well be applied in this proceeding. As pointed out, the basis upon which the assailed rentals were constructed was and is unduly low by comparative standards, as is also the defendant carrier's return on its investment. The rentals for dry storage are considerably lower than the average annual rentals prevailing in the Birmingham area, and by comparison most of the rentals for the single-purpose buildings are also unduly low. Little value can here be attached to the factor of the rentals that the tenants are willing to pay, for as shown, some of the tenants appear to be dissatisfied in varying degree with the low rentals they are now paying. The tenants parties to the lease agreement of October 13, 1955, agreed to pay rentals then apportioned to them on a pro rata basis of the estimated cost of construction, and such increased rentals as might be required by higher construction costs. Thus, if willingness to pay is to be considered, we cannot ignore the fact that the tenants have indicated their agreement to pay rentals based on an apportionment of the con-

struction costs of the terminal. If we were to consider only present willingness to pay, it would necessarily follow that rentals per square foot would vary from tenant to tenant, and the result would be discrimination as between the tenants themselves.

The evidence is convincing that the rentals charged by the defendants are in most instances below fair rental value. They fail to reflect all attributable costs as hereinbefore discussed; many are well below the average annual rental value on a square footage basis prevailing in the Birmingham area; and they are grounded on a basis which was and is lower than the present record indicates is reasonable: namely, 8 percent on the value of the land and 10 percent on the costs of construction. As indicated, complainant and certain interveners would include in the rental base an amount equivalent to 20 percent of the costs of the special-purpose equipment such as refrigeration equipment, and of special construction in the single-purpose buildings. As hereinbefore set forth the general practice in the Birmingham area is to recover the cost of the special-purpose equipment during the initial term of the lease, to require that such lease be for about 20 years, and to charge for single-purpose buildings a higher rental than normally applied to multiple-purpose buildings. There appears no reasonable justification for requiring in the instant case that the Southern fully amortize the costs of special equipment and construction during the terms of the 5-year lease here in issue. Obviously, such equipment and construction have longer lives than 5 years and there is no evidence that at the termination of the 5-year lease, the Southern will experience any more difficulty in obtaining tenants for the single-purpose buildings than it would for the multiple-purpose buildings. The additional costs of the special-purpose equipment and special construction should, however, be included in the costs of the buildings to which the 10 percent described above should be applied. By reason of such inclusion the total costs of the single-

purpose buildings, including costs of the equipment, are greater than comparable multi-purpose buildings and the use of 10 percent of such cost in computing the rentals should obviously require higher rentals for single purpose buildings than for comparable multiple-purpose buildings, which is in accord with the practice in the Birmingham area.

The net result of the defendant carrier's practices is that shippers and receivers of freight utilizing the facilities thus provided are accorded undue preferences and advantages and total transportation charges which constitute departures from the published tariffs, and shippers and receivers utilizing competing facilities, such as those of the complainant, are subjected to unjust discrimination and undue prejudice.

We find that the practices of the defendant railroad in providing space or facilities to tenants of the Birmingham Food Terminal at rentals which are less than fair rentals therefor, as hereinbefore defined, and which are not timely collected, constitute (1) unjust discrimination in violation of section 2, (2) the making and giving of undue and unreasonable preferences and advantages in violation of section 3, and (3) departure from its published tariffs in violation of section 6, of the Interstate Commerce Act. We further find that the defendant railroad has made unlawful extensions of credit in contravention of our regulations promulgated under section 3(2) of the act.

The evidence relating to the defendant's failure to make timely collection of rentals, and to the unwarranted extensions of credit in contravention of our regulations, will be referred to the Department of Justice with our recommendation that prosecution be instituted under the penal provisions of the act.

An order will be entered requiring the defendants to cease and desist from the unlawful practices herein found to exist, and to report to us the action taken within the time set forth in the attached order.

CHAIRMAN TUGGLE concurs in the result.

COMMISSIONER HUTCHINSON, dissenting in part:

I agree that absorption by the Southern of the costs for installation of tracks Nos. 6 to 16, inclusive, and exclusion of such costs from the rental base is in violation of section 3(1) of the Interstate Commerce Act. However, the evidence presented is insufficient to support a finding that other specific costs were improperly excluded.

I do not agree that failure to collect rentals was untimely to such an extent as to constitute violation of the act. Rental payments were temporarily discontinued because of a bona fide disagreement with the Southern over the cost basis upon which rentals were to be fixed after August 1, 1957, the date of completion of the terminal, and because of pending litigation before us. Attempts to resolve differences between the parties culminated in agreement by the tenants to pay rental arrearages of at least 2 months, resulting in a remittance to the Southern of some $52,000. Throughout this period we had before us the issue of the lawfulness of absorption by the Southern of certain costs, which the tenants and the Southern agreed to exclude from the rental base. The findings here are that certain exclusions, most of which are not specifically ascertainable, are unlawful. The effect of this is to say that it was unlawful to defer collection of rentals, the basis of which it itself found unlawful in this proceeding.

Although fair rental value rather than cost is the appropriate standard by which to determine the lawfulness of charges assessed shippers or receivers of freight for use of facilities, on this record I am unable to say that a return of 8 percent of the value of the land and 10 percent of the costs of construction and special purpose equipment would be reasonable. The basis used in constructing rentals is subject to many variables, and of necessity must fluctuate with economic conditions. Disregard of these factors results in the imposition of a fixed criteria of unreasonableness as the measure of lawfulness. Accordingly,

a finding that 8 percent of the properly allocated costs of construction, special-purpose equipment, and the value of the land is not shown to be unduly low in violation of sections 2 and 3 of the act is warranted.

I agree with the majority in other respects.

COMMISSIONER MCPHERSON, dissenting in part:

In *Baltimore & O. R. Co.* v. *United States*, 305 U.S. 507, the Supreme Court decided that the furnishing by a carrier of non-transportation services below cost constituted a violation of section 6(7) of the act.

In the instant case the complaint is not that the respondent is furnishing the facilities below cost but rather is furnishing them at less than a compensatory return on the full value of the facilities, hence, the dispute as to what items should or should not be included in full value and the formula to be applied to such full value to determine compensatory return.

In *Union Pac. R. Co.* v. *United States*, 313 U.S. 450, the Supreme Court struck that portion of the lower court's injunction which provided that the rates for space should be those "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation including maintenance and depreciation" and in lieu of those words substituted the words "which is a fair rental value of the facilities occupied."

In that case, the Supreme Court at page 473 said:

> If the correct test is fair rental value, cost of facility is only persuasive, not determinative. Consequently it may be shown as a material factor in determining the fair rental value of the properties but the rates are not required to be upon a level which will give a return upon the value of the investment as a whole.

Fair rental value rather than a compensatory return upon full value of the market facilities is the standard by which the City's schedule of rates is to be judged. To determine fair rental value, the going rates of rental for similar facilities in the community are significant, as are the rentals prospective tenants are willing to pay. Like-

wise, evidence of the over-all cost and the over-all value of the properties would be material. The cost of furnishing the facilities, including the normal return on capital employed in like enterprises would have weight. Other pertinent factors would doubtless emerge in a controversy to have determined judicially whether certain rentals received are or are not fair. When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met.

The rentals charged in the instant case may not amount to the maximum allowed under the fair rental value theory. On the present record, however, I cannot justify a conclusion based upon judgment that the rentals charged are less than the fair rental value, and am unable to conclude that there were violations of sections 2, 3, and 6 of the Act.

I agree that defendant railroad has made unlawful extensions of credit in failing to collect freight bills promptly in contravention of our regulations under section 3(2) of the act.

COMMISSIONER WEBB, dissenting in part:

I agree with the report insofar as it finds that defendants acted unlawfully in extending credit and in failing to make timely collection of rents. I also agree with the majority that the legal yard-stick to be employed in determining the issue of the other unlawful concessions to tenants is the fair rental value of the premises involved. *Union Pac. R. Co.* v. *United States*, 313 U.S. 450 (1941). It seems to me, however, that the report, in finding indirect concessions to tenants, is based less on fair rental value than on the fact that Southern failed to recover 8 percent on its investment in land and 10 percent on buildings.

To support the conclusion that Southern rented Terminal space for less than its fair rental value the majority of the Commission, in my opinion, gives inordinate weight to the testimony of two real estate witnesses. The record indicates only that a prudent, non-carrier investor might

not have constructed the Terminal without the assurance of a return greater than that which might have been anticipated by Southern. However, I do not understand the law to require a railroad to receive any specific return on property leased to shippers. All that is required is that the property not be rented below cost, or on a discriminatory basis, or below the prevailing market value of comparable rental property. Cf. *Baltimore & O. R. Co. v. United States*, 305 U.S. 507 (1939). The report fails to consider the fact that in view of the supply of, and demand for, warehouse space in the Birmingham area, it might be economically impossible to obtain a 10-8 percent return on the two categories of investment. The record, in my opinion, fails to support a conclusion that Southern charged any of its tenants one penny less than would have been charged by a noncarrier landlord bent on maximizing its profits.

The principal real estate witness in this proceeding was Mr. Sidney Smyer whose realty firm competes with the Birmingham Food Terminal for tenants. In general, the testimony of Mr. Smyer and of Mr. W. P. Engel deals with the rate of return ordinarily received throughout the South when industrial or commercial property is specially constructed for use of a particular tenant or tenants. Viewed in that light the 10-8 formula may be a valid rule of thumb. However, the testimony of these two real estate witnesses fails to prove the fair rental value of warehouse space intended for lease to the general public at the particular time and place involved here. Far more revealing on the question of fair rental value than the testimony of Messrs. Smyer and Engel are the protests of the complainant and its intervening allies at the time Southern first considered construction of the terminal.

In my opinion, the crucial fact in this proceeding is that Southern tripled the amount of warehouse space in Birmingham. The Birmingham warehousemen naturally did not relish facing the chill wind of this competition.

Although they were given an opportunity to rent space at the terminal, they preferred to protect their investment in warehouse property located in the downtown area of Birmingham. They pleaded with Southern not to treble the amount of warehouse space because, they said, depressed rentals would inevitably result. The complainant's fear of destructive competition may not have been wholly justified. Its gross revenues were higher in 1957 than its average annual gross revenue for the 4-year period, 1953-1956.

It is hard to believe, however, that warehouse space in Birmingham could be increased threefold without depressing rental values to some extent. Nevertheless, this report concludes that the 10-8 formula which, according to witness Engel has generally prevailed throughout the region for many years, measured the fair rental value of warehouse property in Birmingham both before and after a threefold increase in supply. The report avoids the issue of fair rental value by saying that: "If we were to consider only present willingness to pay, it would necessarily follow that rentals per square foot would vary from tenant to tenant, and the result would be discrimination as between the tenants themselves." Dissimilarity in average annual rentals per square foot is not evidence of discrimination.

No economic or social benefit is likely to flow from the Commission's action. Not a single shipper of goods in interstate or foreign commerce has complained that shipper-tenants at the terminal are the beneficiaries of indirect concessions. The $8,000,000 facility is the type of project which is often financed with public funds. This privately financed contribution to community betterment should not be condemned merely because certain shippers, as yet unknown, may sometime suffer undue prejudice in violation of section 2 of the Interstate Commerce Act. Obviously, there is potential discrimination inherent in the ownership and operation of warehouse facilities by common carriers of whatever species. The Commission has the power to

prevent such discrimination from becoming actual. The exercise of that power, however, should be tempered by a large measure of administrative self-restraint. As Commissioner Eastman said in a somewhat different section 2 proceeding:

> The object of that section is to protect shippers against unjust discrimination. Here no shippers are complaining of discrimination. There is nothing to indicate that any one is being injured by this service, but on the contrary the evidence is that it meets with general favor. Under such circumstances we should be slow to find upon purely technical grounds that section 2 is violated.
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> Nor do I believe that a "tendency to create violations of sections 2 and 3 of the act" is necessarily unlawful. If violation of those sections exist, they are unlawful and must be corrected, but we have no power to condemn a "tendency." If it could be shown that the tendency is irresistible, with the result that violations exist and must inevitably continue to exist, there would be ground for condemnation; but that has not been shown here. *Constructive and Off-Track Freight Stations*, 156 I.C.C. 205, 235, 237 (concurring expression).

I would find the rentals charged by the defendant railroad to tenants of the Birmingham Food Terminal not shown to be unjustly discriminatory or unduly preferential in violation of sections 2 and 3, respectively, of the Interstate Commerce Act.

COMMISSIONERS WINCHELL and HERRING did not participate.

APPENDIX A

Building No.	Tenants	Total space	Freezer or cooler space	Building cost	Monthly rental	Approximate rental per square foot per year	Business
		Square feet	*Square feet*			*Cents*	
1	Doc's Transfer and Warehouse, Inc.	32,208	0	$145,117.32	$967.45	36	Warehouse.
2	Thomas N. Nelson and Company, Inc.	202,400	47,075	1,532,046.10	10,213.64	60	Do.
3	Alabama Potato Service	10,875	600	65,881.71	439.21	48	Food processor.
4	Robert N. Nelson	21,000	0	88,940.62	592.94	34	Warehouse.
5	W. L. Smith Poultry Company	21,875	2,550	330,129.63	2,200.87	121	Food processor.
6	S. T. Jarrell Company	17,500	0	104,851.30	699.01	48	Dried milk.
7	Alabama Paper and Metalware Company	30,275	0	156,804.89	1,045.36	41	Packages, et cetera.
8	Birmingham Terminal Cold Storage Company	105,000	59,825	1,136,877.80	7,579.19	87	Warehouse.
9	Birmingham Frozen Foods, Inc.	12,250	5,500	146,531.61	976.89	96	Frozen foods.
10	Central Bag & Burlap Company	13,125	0	58,813.66	392.09	36	Bags, et cetera.
11	Bruno Foods Stores	21,875	0	94,533.77	630.22	34	Foods.
12	Bryan Brothers Packing Company	22,400	12,400	435,533.63	3,903.55	209	Meats.
13	Early American Foods, Inc.	8,750	0	44,154.63	294.36	40	Foods.
14	Home Provision Company	7,460	2,000	77,251.54	515.01	83	Meats.
15	Associated Grocers of Alabama	100,320	6,672	618,179.10	4,521.20	54	Foods.
16	Simonetti Realty Company, Inc.	39,560	0	175,286.64	1,168.59	35	Do.
17	Flint Refrigeration Company	22,050	0	125,461.30	836.41	45	Refrigeration.
18	Edison Produce Company	32,500	7,500	188,285.55	1,255.25	46	Farm produce.
19	Alex Kontos Fruit Company	7,800	1,320	58,432.83	389.55	60	Bananas.
20-A	George Espy Produce Co.	25,155	2,000	150,125.46	1,000.84	48	Farm produce.
20-B	Magic City Produce Company, Inc.	34,905	4,256	189,582.73	1,263.89	43	Do.
31-30	Jefferson County Truck Growers Association	[1] 24	.....	949,422.14	6,329.48		Do.

[1] The total land area allocated to this tenant is shown as 24 acres, but the actual space occupied in buildings and sheds is not specified.

APPENDIX B

Construction costs as computed by the Southern Realty Company account[1]

Realty Company account[1]		$7,303,969.29
Additions:		
Land—79.686 acres at $2,500 per acre	$199,215.00	
Gas mains	16,924.00	
Preparing and paving gutters	2,133.61	
Paving:		
Repair of hole in Growers Association area	2,061.62	
Additional paving in Growers Association area	10,034.04	
Adjustment for gutters over estimate	46.30	
	230,414.57	
Deductions from above costs to be borne by Southern:		
Work in old machine shop	11,975.00	
Storm drainage east of old machine shop	7,208.30	
Temporary ramp for unloading cars	117.25	
Sanitary sewers for old machine shop	2,942.50	
Grading by Jacobs	66,090.66	
Paving, curbs and retaining walls in excluded areas and east machine shop	103,598.23	
Maintenance—paving repair	200.00	
Engineering and blueprint	13,902.34	
Insulation for Birmingham Terminal Cold Storage building	487.56	
	206,521.84	23,892.73
Total Realty Company cost		7,327,862.02

[1] Represents cost charged to the account of the Realty Company to be used as the base for computing rentals. Costs not allocated to the Realty Company are borne by the Southern and are not included in the rental base.

APPENDIX C

Summary of terminal costs

Realty Company costs:		
Jacobs contract—		
Buildings	$5,968,995.75	
Preliminary	25,840.00	
Fencing	4,399.07	
Storm drainage	215,645.75	
Water system	107,502.98	
Sanitary sewers	51,278.81	
Paving, curbs, retaining walls	620,107.57	
Exterior lighting (Truck Growers)	25,572.80	
Street lighting	5,500.00	
Builder's risk insurance	7,430.00	
		$7,032,272.73
Jacobs settlement (received in addition to contract):		
Grading	66,090.66	
General items	3,000.00	
Building extras	95,909.34	
		165,000.00
Other costs:		
Additional building costs—		
Refrigeration cost	13,185.75	
Other building costs	17,043.51	
Unidentified items	22,056.86	
Engineer services recorded	13,902.34	
General item contracts	6,697.46	
Performance bond	32,250.00	
Architect's fee	16,000.00	
		121,135.92
		7,318,408.65
Less architect's allowance by Jacobs		7,500.00
Total Realty Company cost		7,310,908.65
Southern costs (costs borne by Southern):		
Land—102.192 acres at $4,500 an acre	465,854.00	
Grading by Hewitt:		
Contract	321,000.00	
Supervision by Jacobs	26,000.00	
Demolition	27,000.00	
Gas mains	16,924.00	
Paving and gutters	14,275.57	
Tracks	158,000.00	
Removal of tracks	10,000.00	
Promotion and engineering expenses	286,097.66	
Total Southern costs		1,325,151.23
Total costs		8,636,059.88

APPENDIX D

Statement showing cost data in which the complainant and certain intervenors claim rental should be based, and the estimated rental computations thereon

Buildings:		
Jacobs contract—		
Refrigeration costs	$1,336,298.76	
Other costs	4,632,696.99	
		$5,968,995.75
Extras:		
Refrigeration costs	60,000.00	
Other costs	96,695.46	
		156,695.46
Other construction costs:		
Preliminary	25,840.00	
Fencing	4,399.07	
Storm drainage	215,645.75	
Water system	107,502.98	
Sanitary sewers	51,278.81	
Paving, curbs and walks	620,107.57	
Exterior lighting	25,572.89	
Street lighting	5,500.00	
Builder's risk insurance	7,430.00	
Gas mains	16,924.00	
Paving and gutters	11,275.57	
Tracks	158,000.00	
Removal of tracks	10,000.00	
Unidentified general items	3,000.00	
Performance bond	32,250.00	
Other general item contracts	6,697.46	
Promotion and engineering expense	300,000.00	
		1,604,424.01
Total construction cost		7,730,115.22
Land costs:		
Area of 102.192 acres at $4,500 an acre	465,854.00	
Demolition of buildings	27,000.00	
Grading by Hewitt	321,000.00	
Grading by Jacobs	66,090.66	
Supervision by Jacobs	26,000.00	
Total land costs		905,044.66
Total costs		8,636,059.88

Divison of construction costs between refrigeration and nonrefrigeration costs:

Total construction cost		7,730,115.22
Less refrigeration	1,336,298.76	
Less extras	60,000.00	
		1,396,298.76
Net construction cost		6,333,816.46

Rent formula:

Annual rent based on 10 percent of net construction cost, 20 percent of refrigeration cost and 8 percent of land cost:

Estimated rentals—

On net construction cost	$633,381.65
On refrigeration cost	279,259.75
Land cost	72,475.57
Total annual rent	985,116.97
Total monthly rent	82,093.08